No. 10-885

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF MAJOR GENERAL (RETIRED) CHARLES E. TUCKER, JR., AND THE INTERNATIONAL HUMAN RIGHTS LAW INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), which bars active-duty military personnel from bringing claims against the government for injuries arising out of activity incident to service, should be overruled.

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INTEREST OF *AMICI CURIAE*[1]

Major General (Retired) Charles E. Tucker (USAF) served for twenty-seven years in the United States Air Force, Air Force Reserve, and Air National Guard. General Tucker served on active duty as an Air Force Judge Advocate for nine years. From 1989 to 1992, he was an Assistant Professor of Law at the United States Air Force Academy. In 2004, he served as Military Legal Advisor to the United States Ambassador to Iraq; in 2005 he served in the Department of Defense Office of General Counsel. General Tucker has deployed in support of operations in Honduras, Brazil and Central Asia and served as Legal and Economic Advisor to the High Representative in Bosnia and Herzegovina. Between 2005 and 2008, he served as Chief of Staff of the Wisconsin Air National Guard. In 2001, he was named the Air National Guard's Outstanding Judge Advocate. General Tucker's other decorations include the Legion of Merit, Bronze Star, Defense Meritorious Service Medals, and campaign medals from Kosovo, Iraq Medals, and the Global War on Terrorism Medal.

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Prior to his military retirement, General Tucker was Director of Joint Doctrine, Training and Force Development for the National Guard Bureau. He developed training and exercise policies to maintain readiness in the National Guard. He oversaw the Joint Commander Training Course, the Joint State Staff Officer Course, and the National Guard Homeland Defense & Joint Interagency Training Centers. General Tucker thus has had firsthand experience with the issues of military discipline, readiness, and risk management that lie at the heart of this case.

General Tucker is now Executive Director of the International Human Rights Law Institute (IHRLI) at DePaul University College of Law. IHRLI's purpose is to link scholarship, outreach, and educational activities with the design and management of human rights and rule of law programs throughout the world. This interest in advancing the rule of law extends not only to civilians but also to the rights of men and women currently serving in our armed forces. This case, which concerns the ability of servicemen and women to seek redress when their rights are violated by the Government, thus falls at the core of IHRLI's mission.

STATEMENT

The Federal Tort Claims Act (FTCA) permits private claims against the United States

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). This statute "for the first time recognized the general principle of governmental liability in tort." Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 861 (6th ed. 2009) ("Hart & Wechsler"). Justice Scalia has aptly pointed out that, "[r]ead as it is written, this language renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees." *United States v. Johnson*, 481 U.S. 681, 693 (1987) (Scalia, J., dissenting).

That is not how this Court has read the FTCA, however. In *Feres v. United States*, 340 U.S. 135 (1950), this Court held that active-duty military personnel may not sue the government for injuries arising out of activity incident to service. Subsequent cases have made clear that this broad immunity rests primarily on concerns about military discipline and insulating military decisionmaking from intrusive

judicial review, as well as on the assumption that the Veterans' Benefits Act provides an alternative remedial scheme for injured servicemen that supplants FTCA liability. These rationales are grounded neither in the text of the FTCA nor in the documented intent of Congress, but rather in the federal courts' own policy judgments.

The Petitioners' filing in this case amply demonstrates the confusion that *Feres* continues to create in the lower courts. This *amicus* brief focuses instead on two broader sets of inconsistencies. The first is between *Feres* and the policy justifications it purports to serve. *Feres* did not create a blanket rule of military immunity; rather, it permits suits implicating military affairs in many contexts, such as when the plaintiff is a civilian or an off-duty serviceman. The doctrine thus fails as an effort to insulate military affairs from judicial review, and such review occurs on a regular basis. Worse, no actual evidence shows that *Feres* actually fosters military discipline or improves military decisionmaking. There is ample reason to believe that, by preventing redress for injured military personnel and their families, *Feres* may actually hurt military morale.

The *Feres* doctrine is also fundamentally inconsistent with this Court's more general approach to statutory construction. The FTCA includes an extensive list of statutory exceptions to liability, many of which target the core military interests that *Feres* supposedly protects. Yet *Feres* was decided in an era of freewheeling judicial adaptation of statutes to fit

the felt needs of the law, including implied rights of action and implied defenses against federal liability. The Court's contemporary approach, by contrast, stresses statutory text and the demonstrable intent of the enacting Congress; accordingly, this Court has generally refused to imply new private rights of action, and it has treated arguments for implied defenses skeptically. Under contemporary jurisprudence, the Court would certainly view the specific defenses in the FTCA as exhausting the statute's provision for military necessity and eschew creating a broad immunity as a matter of federal common law.

Feres is thus ripe for reexamination. As the Petitioners' filing demonstrates, sixty years of frequent judicial construction has failed to generate a workable rule for when *Feres* applies and when it does not. Nor is there meaningful government reliance on *Feres*. The Government does not claim a right to injure its military personnel with impunity, and in any event the many exceptions to *Feres* ensure that the Government is not reliably or predictably shielded from liability. As a factual matter, both the structure of the military and the security environment in which it operates have changed significantly in the past sixty years; likewise, the disparity between the *Feres* regime and the civil tort system has grown. Time too has undercut the legal assumptions of *Feres* – both for this Court's approach to statutory construction and the array of significant legal claims for which *Feres* cuts off redress. This Court should reconsider its

decision in *Feres* and return to the statutory structure that Congress actually enacted in the FTCA.

ARGUMENT

I. The *Feres* Doctrine, as Currently Construed, Fails to Protect the Interests It Purports to Serve.

This Court has relied on three rationales to justify the *Feres* doctrine: the "distinctively federal . . . character" of the relationship between the Government and members of the armed forces, *Feres*, 340 U.S. at 143; "the existence of . . . generous statutory disability and death benefits" for injured servicemen and women under the Veterans' Benefits Act, *id.* at 144; and concerns that FTCA claims by members of the armed forces for injuries incident to service "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness," *United States v. Shearer*, 473 U.S. 52, 59 (1985).[2] This Court has deemed the first and

[2] *Feres* itself offered a fourth rationale — that no form of "parallel private liability" is analogous to servicemembers' claims for service-related injuries. *See* 340 U.S. at 141-42. But this Court has rejected this parallel-private-liability requirement in related contexts under the FTCA, *see, e.g.*, *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69 (1955), and this Court's more recent *Feres* doctrine cases have not relied on it. *See Johnson*, 481 U.S. at 688-91; *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671-72 (1977).

second rationales "no longer controlling," leaving the doctrine's primary focus on interference with military discipline and decisionmaking. *See id.* at 57, 58 n.4. But the current doctrine maps poorly onto any of these rationales. Worse still, its unfair treatment of servicemen threatens actually to undermine the values that the *Feres* doctrine was designed to protect.

A. No evidence supports the *Feres* doctrine's assumption that nonliability protects military decisionmaking and discipline.

Although *Feres* itself did not rely upon it, subsequent cases have rested the doctrine almost entirely on concerns about military discipline and decisionmaking. As this Court said in *United States v. Muniz*, 374 U.S. 150 (1963):

> In the last analysis, *Feres* seems best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.

Id. at 162. Although the Court's concern is intuitively understandable, it rests on no actual *evidence* that either military discipline would suffer or military decisionmakers would be over-deterred if they were subjected to FTCA liability.

As one leading scholar of military law has pointed out, "[t]he military discipline rationale . . . lacks any foundation in empirical or academic studies of the military. . . . To the contrary, a strong argument can be made that the primary elements of cohesion and discipline in the military have virtually nothing to do with potential civil liability." Jonathan Turley, Pax Militaris: *The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1, 17 (2003). After all, "[t]here are no studies that suggest the existence of internal grievance processes, federal litigation, congressional complaints, or media coverage diminishes military readiness or discipline." *Id.* at 26. Any decision to carve out a policy-based exception to a broad statutory provision for liability ought to at least rest on an empirical demonstration that the relevant interests really are implicated. Sixty-one years after this Court's creation of the *Feres* defense, it is past time to revisit the doctrine's conclusory assumptions.

B. Exceptions to the doctrine ensure that courts frequently consider the military's internal affairs.

If the point of the *Feres* doctrine is to prevent the judiciary from inquiring into sensitive military affairs, then the doctrine has plainly failed. As Justice Scalia pointed out in his dissent in *Johnson*, courts may well have to inquire into military decisionmaking in at least three scenarios notwithstanding *Feres*. First, civilians may sue under the FTCA in cases that

implicate military affairs: if, for example, a military air traffic controller negligently caused a military plane to crash into a civilian's house, *Feres* would not bar the homeowner's suit. Similarly, civilians injured in military hospitals can and do sue under the FTCA. *See, e.g.*, *Romero v. United States*, 954 F.2d 223, 225 (4th Cir. 1992); *Burgess v. United States*, 744 F.2d 771 (11th Cir. 1984). Second, military personnel may sue if their injury is not "incident to service" – if, for example, they are on leave when injured. And third, when a servicemember's injury is caused by a civilian contractor, as in *Johnson*, the servicemember may sue the civilian rather than the United States – even if the servicemember's injury is incident to service and even if judges would have to inquire into military decisionmaking to resolve the claim.

Moreover, the *Feres* doctrine generally does *not* bar claims for nondamages relief.[3] These claims may include challenges to military practices when the plaintiff seeks only declaratory or injunctive relief, as well as judicial review of courts-martial proceedings by federal writs of *habeas corpus*. The Uniform Code of Military Justice provides a complaint procedure for "[a]ny member of the armed forces who believes himself wronged by his commanding officer," 10 U.S.C. § 938, and the military's response to these complaints

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[3] *See* Turley, 71 Geo. Wash. L. Rev. at 22 ("[T]he *Feres* doctrine does not actually protect the military from judicial review but rather protects it from monetary damages in lawsuits by service members.")

is subject to judicial review, *see, e.g.*, *Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973) (reviewing a § 938 proceeding via a petition for a writ of mandamus). Similarly, 10 U.S.C. § 1552 provides a civilian-review-board procedure for correcting military records, and that procedure is also subject to judicial review, *see Ayala v. United States*, 624 F. Supp. 259, 263 (S.D.N.Y. 1985).

Given this pattern of judicial review and potential liability, it is hard to think of any areas of military decisionmaking in which military personnel may operate free from concern about potential lawsuits. Areas least likely to involve either civilians or off-duty soldiers – such as combat orders – are already covered by an explicit statutory exception to the FTCA. Nor does the pattern of actual liability track any logical need to maintain disciplined relationships between servicemembers and their superior officers. No such relationship exists in medical malpractice cases, whereas current law permits suits against a civilian contractor even if he was acting under orders from the plaintiff's superior officer. This patchwork of judge-made immunity has little to recommend it vis-à-vis the carefully considered statutory framework of the actual FTCA.

C. Preventing servicemembers and their families from obtaining redress for their injuries may well undermine military morale and discipline.

American law's many broad waivers of sovereign immunity have typically assumed that accountability enhances – rather than undermines – respect for government authority. That imperative is no less true within the military. For example, *Johnson* denied relief to the family of a serviceman whose helicopter was directed into the side of a mountain by the instructions of a negligent air traffic controller. Justice Scalia pointed out that "the morale of Lieutenant Commander Johnson's comrades-in-arms w[ould] not likely be boosted by news that his widow and children w[ould] receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death." 481 U.S. at 700 (Scalia, J., dissenting). This adverse effect on morale is particularly likely to be true in areas – like the medical malpractice in this case – where civilians with analogous injuries could expect a far more generous recovery.

Beyond the general corrosive effect on morale of denying redress for injured servicemembers and their families, *Feres* may undermine morale and discipline by weakening legal regimes designed to promote the rule of law within the military community. Federal courts have applied *Feres*, for example, to bar civil

rights claims involving racial discrimination, hazing, and retaliation against whistleblowers.[4] One need not deny that intrusive judicial scrutiny may sometimes interfere with military discipline and morale to recognize that the breakdown of legal rules guaranteeing servicemembers rights of equality, basic personal security, and fair treatment likewise threaten to cause demoralization and resentment. How to manage these competing concerns may be a difficult question, but it is hardly obvious that courts can answer it better than Congress has by crafting specific exceptions to FTCA liability.

These problems are unlikely to decrease in importance in the foreseeable future. Congress has recently repealed the military's "Don't Ask, Don't Tell" policy and required integration of gay and lesbian servicemembers into military society.[5] Maintaining

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[4] *See, e.g.*, *Chappell v Wallace*, 462 U.S 296 (1983) (extending *Feres* to bar *Bivens* relief for constitutional claims involving racial discrimination against servicemembers), *Matreale v. New Jersey Department of Military & Veterans Affairs*, 487 F.3d 150 (3rd Cir 2007) (applying *Feres* to bar suit by National Guard Officer alleging retaliation for cooperating with a sexual harassment investigation); *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678 (1st Cir 1999) (applying *Feres* to bar a serviceman's claims for severe hazing by his fellow servicemen); *Wright v Park*, 5 F.3d 586 (1st Cir 1993) (applying *Feres* to bar a whistleblower's claims against National Guard officers alleging that he was cashiered for reporting safety violations and unauthorized use of military aircraft).

[5] *See* Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. Times, Dec. 18, 2010 (available at http://www.nytimes.com/2010/12/19/us/politics/19cong.html).

legal restraints on discrimination and harassment within the military community will be central to this effort. Likewise, respect for human rights and the rule of law has become increasingly critical to the legitimacy of American military operations in the War on Terror and elsewhere, as well as to our nation's ability to maintain domestic and international support for those operations. The *Feres* doctrine weakens the statutory structure designed to enforce those values among military personnel, both by denying redress to servicemembers whose rights are violated and undermining statutory protections for those who report violations. To the extent that it does this, *Feres* undermines the military's ability to achieve its mission.

All of these considerations require a fine balance among competing imperatives. The problem is that the *Feres* doctrine is an extremely blunt instrument for striking those balances. Its "incident to service" criterion is both over- and under-inclusive for the values at stake, and the factors for *applying* that criterion are so indeterminate that they deny military decisionmakers any benefit of predictability. Congress is simply better suited than the courts to make these judgments.

D. The current scheme of veterans' benefits does not provide an exclusive or adequate alternative to FTCA suits.

The D.C. Circuit has aptly observed that "the presence of an alternative compensation system [neither] explains [n]or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable." *Hunt v. United States*, 636 F.2d 580, 598 (D.C. Cir. 1980). Benefits under the Veterans' Benefits Act (VBA), 38 U.S.C. §§ 301 *et seq.*, do not explain the *Feres* doctrine because this Court has allowed servicemen to recover under the FTCA even when they had already received benefits under the VBA.[6] The VBA does not limit recovery to injuries incident to service, and as a result servicemembers may recover under both the FTCA and the VBA in all the scenarios described above, including when they are injured off duty. That result would make no sense if Congress indeed intended the VBA to be an exclusive remedy. Nor is there any reason to think that VBA benefits are any less adequate a remedy for servicemembers' injuries – or their families' losses – when injuries are not incident to service.

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[6] *See United States v. Brown*, 348 U.S. 110, 113 (1954) (concluding that because "Congress had given no indication that it made the right to compensation [under the VBA] the veteran's exclusive remedy, the receipt of disability payments did not preclude recovery under the Tort Claims Act"); *Brooks v. United States*, 337 U.S. 49 (1949) (allowing recovery to off duty servicemen injured by a civilian Army employee notwithstanding VBA benefits).

More fundamentally, the existence of an alternative remedial scheme is an unpersuasive reason for courts to create a bar to bar recovery under a statutory cause of action like the FTCA. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), this Court held that the existence of a specific statutory remedy under the Social Security Act foreclosed federal common law claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for due process violations in the administration of Social Security benefits. It was critical to the Court's reasoning, however, that *Bivens* is an implied remedy. The Court stressed that courts should ordinarily defer to Congress's own balancing of the costs and benefits of providing individual remedies in a particular context. *See* 487 U.S. at 421-23.

That reasoning simply does not apply when Congress has prescribed an express remedy like the FTCA. That remedy is *part* of the statutory balance, and if Congress thought allowing veterans' benefits alongside FTCA recovery would be excessive, it could easily have calibrated the relationship between those remedies more precisely in the relevant statutes. The federal courts have no warrant to recast that balance by creating a common law defense like the *Feres* doctrine.

II. The *Feres* Doctrine Inappropriately Intrudes on Congress's Remedial Scheme Under the FTCA.

As this Court has noted, the FTCA "was the product of nearly thirty years of congressional consideration and was drawn with numerous substantive limitations and administrative safeguards." *Indian Towing Co.*, 350 U.S. at 68. Both the structure and history of the statute indicate that extension of FTCA liability to the military was by no means unexpected. Unsurprisingly, a number of specific exceptions shield the core military interests that the *Feres* doctrine purports to protect. Given this carefully calibrated statutory scheme, the interposition of a blanket federal common law defense is both unnecessary and disruptive.

A. Textual exemptions under the FTCA adequately protect legitimate federal interests in military policy.

The FTCA expressly limits its broad waiver of sovereign immunity and provision for tort remedies against the Government with several exceptions. The most obviously relevant exception absolves the Government from liability on "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). This provision is directed to the same core concerns as the *Feres* doctrine, but its approach is much more focused and limited.

Other portions of 28 U.S.C. § 2680 address legitimate concerns arising out of servicemembers' suits. One exception covers both "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid," and any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.* § 2680(a). The first part of this exemption prevents the FTCA from becoming a vehicle for challenging codified military policy; the second shields military decisionmakers from challenges to virtually any command or disciplinary decisions.

Other relevant exemptions include § 2680(k), which covers "[a]ny claim arising in a foreign country," and § 2680(h), which prohibits claims for most intentional torts. These exemptions foreclose claims arising in the most sensitive military environments and that might most readily be asserted to oppose military orders and disciplinary measures. Taken together, the result is a statutory regime that responds well to legitimate concerns about military discipline and effective military decisionmaking. As Justice Scalia concluded in *Johnson*, "Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis for us to supplement – i.e.,

revise – that congressional disposition." 481 U.S. at 693 (Scalia, J., dissenting).

The FTCA's textual exemptions, moreover, safeguard the Government's legitimate interests more rationally than the *Feres* doctrine. That is because the exceptions are not limited to servicemen on active duty: they cut off *all* suits, unlike the *Feres* doctrine. And although some exemptions – such as that for discretionary functions – may not always be perfectly pellucid, they nonetheless compare favorably to the unpredictable and indeterminate tests applied in the lower courts for injuries "incident to service." This is not an area where Congress failed to do its job and rationally provide for legitimate governmental interests the FTCA implicates. The *Feres* Court should not have intervened simply on the ground that it might have handled some of the relevant tradeoffs differently.

B. The *Feres* doctrine is out of step with this Court's jurisprudence on implied rights of action and federal common law.

In *Feres*, the Court insisted that the FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." 340 U.S. at 139. The Court actually went further, carving out a class of cases within the plain text and imposing on that class

a nontextual rule of blanket immunity. But the Court's overall approach reflected the judicial norms of the time, which accorded federal courts broad latitude to frame remedies under federal statutes. Eight years earlier, for example, this Court had said that "[w]hen a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted." *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942).

This view of the judicial role reached its high watermark a decade and a half after *Feres* in *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), which asserted that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Borak* was a case about implied rights of action for private plaintiffs under federal statutes, when those statutes prohibited certain conduct but did not specify who was entitled to enforce the law. But implying a defense – as the Court did in *Feres* – is no different in principle from implying a right of action. Each implication presupposes that courts should supplement the text of federal statutes to ensure that they "make sense" in light of Congress's purposes and the overall policy of the regulatory scheme – as courts perceive them.

Put simply, this Court does not do things that way anymore. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), this Court quoted the language from *Borak* above and then said that "[w]e abandoned that understanding in *Cort v. Ash*, 422 U.S. 66, 78 (1975) . . . and have not returned to it since." *Id.* at 287. As *Sandoval* makes clear, this Court has been largely unwilling to recognize new implied rights of action, and it has narrowly construed old ones, such as the *Bivens* case's implied remedy for constitutional violations by federal officers. *See generally* Hart & Wechsler at 705-07, 735-40.

This Court has recognized that implied defenses to statutory remedies raise similar problems. In *United States v. Oakland Cannabis Buyer's Coop.*, 532 U.S. 483 (2001), the Court rejected an argument for an implied "necessity" defense to the crime of marijuana manufacture and distribution under the federal Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.* "As an initial matter," the Court said, "we note that it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute." *Id.* at 490. The Court then quoted *United States v. Rutherford*, 442 U.S. 544, 559 (1979), which held that "[w]hether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." Although *Oakland Cannabis* found the Controlled Substances Act's terms foreclosed the necessity defense and thus did not have to decide whether the Court could ever recognize such an implied defense, the Court adopted

a skeptical attitude toward such defenses on the ground that they "would entail a social balancing that is better left to Congress." 532 U.S. at 491 n.4.

Oakland Cannabis's reservation of the question whether federal courts could imply a nontextual defense to a federal statute imposing liability demonstrates just how far the ground has shifted since *Borak* and *Feres*. Like the health-based necessity defense in *Oakland Cannabis*, the military necessity defense recognized in *Feres* entails "a social balancing that is better left to Congress." As we have demonstrated, Congress has already done that balancing by enacting specific defenses that target the key interests that *Feres* seeks to promote.

C. This Court should not infer endorsement of the *Feres* doctrine from Congress's failure to eliminate it by statute.

In *Johnson*, this Court emphasized that although "Congress 'possesses a ready remedy' to alter a misinterpretation of its intent," Congress has not elected to change the *Feres* rule "in the close to 40 years since it was articulated." 481 U.S. at 686 (quoting *Feres*, 340 U.S. at 138). But although this Court has sometimes interpreted Congress's failure to override a settled judicial interpretation as acquiescence, it has also long recognized the dangers of inferring congressional intent from legislative inaction. In *Helvering v. Hallock*, 309 U.S. 106 (1940), for example, Justice

Frankfurter said that "[i]t would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities." *Id.* at 119-20. In *Zuber v. Allen*, 396 U.S. 168 (1969), the Court explained that "Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Id.* at 185 n.21.[7]

This hesitance is well founded. The leading academic treatment of legislative inaction describes many serious difficulties with presuming the correctness of precedents simply because Congress has not overturned them. First, cases inferring intent from inaction "are inconsistent with the traditional proposition that the legislative 'intent' relevant to statutory interpretation is the intent of the enacting Congress, not the continuing intent of subsequent Congresses." William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 95 (1988). Moreover, "the structure of Congress makes it far more likely that something will not happen (inaction) than that it will (action)." *Id.* at 98. We can thus infer little about Congress's actual views from inaction:

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[7] Legislative action may be more persuasive in some circumstances than others *Zuber* suggested that "[i]ts significance is greatest when the area is one of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme." 396 U.S. at 185 n.21. There is, of course, no such ongoing supervision over the FTCA

> The legislative agenda is severely limited; to gain a place on that agenda, a measure must not only have substantial support, but be considered urgent by key people (such as the President and/or the party leadership in Congress). Even if a proposal finds a place on the legislative agenda, it is usually doomed if there is substantial opposition, whether or not most legislators favor it, because of the variety of procedural roadblocks opponents may erect. Consequently, even if a majority of the members of Congress disagree with a judicial or administrative interpretation of a statute, it is very unlikely that they will be able to amend the statute quickly, if at all.

Id. at 98-99.

Professor Eskridge goes on to suggest that "the legislative inaction cases . . . have an asymmetrical, and unfair, impact on the development of legal rules." *Id.* at 114. Hence, "the presumption of correctness [for longstanding judicial or administrative interpretations] might overprotect interpretations benefitting well-organized interests, too often at the expense of the general welfare." *Id.* He concludes that "[g]iven the variety of reasons, unrelated to the merits or legislative support, for the failure of an idea or a measure in Congress, Justice Frankfurter was surely right when he opined in *Hallock* that such considerations 'indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.'" *Id.* at 99.

Today's crowded legislative agenda makes it hardly surprising that Congress has not been able to revisit the *Feres* doctrine. But legislative stalemate hardly absolves this Court of its obligation to interpret the FTCA according to its text and the intent of the enacting Congress.

III. Considerations of *Stare Decisis* Do Not Warrant Adherence to *Feres*.

Feres has been the law for over sixty years, and this Court does not lightly overturn its precedents. This Court has traditionally considered four factors in assessing the weight to be accorded a prior precedent as a matter of *stare decisis*:

> whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 832, 854-55 (1992) (plurality opinion) (citations omitted). Viewed in light of these factors, *Feres* is ripe for reconsideration.

The petition for certiorari in this case amply captures the widespread chaos that *Feres* continues to engender in the lower courts sixty years after it was decided. *See generally* Pet. Writ Cert., *Witt v. United States*, Jan. 7, 2011, at 6-22. Those courts have not been able to agree on the underpinning rationales for the doctrine, the criteria for its application, or how those criteria should be applied even in frequently-recurring fact situations. These uncertainties have real costs for real people in highly vulnerable circumstances. It is hard to think of a better example of an unworkable rule.

Conversely, it is hard to identify any meaningful reliance weighing in *Feres*'s favor, even if the notion of reliance espoused in *Casey* and similar cases extends to the Government and not just to private individuals and entities. *Feres* is no shield, after all, when civilians or off-duty servicemembers sue or (generally speaking) when servicemembers sue for nondamages relief. Moreover, the rule's highly uncertain construction in the lower courts means that the Government cannot count on *Feres* immunity even when the rule plausibly applies in principle. In any event, it would be unfair to impute to the Government any desire to violate its servicemembers' rights with impunity, or simply to loosen up its risk-management standards, simply because the Government might well avoid damages liability at the end of the day under *Feres*.

As for changed facts, today's military operates within a different security environment and force

structure than the military establishment of 1950. The advent of the All-Volunteer Force in 1973, radical shifts in methods of warfighting and corresponding requirements for training and readiness, reorientation of the armed forces from conventional wars to antiterrorism operations and low-intensity conflict, and deployment of high proportions of active duty forces and reservists all over the world – these changes are potentially relevant to the interests of military decisionmaking and discipline that *Feres* considered. Equally relevant are changes to the civil tort system that have increased the disparities between veterans' benefits and the potential payout of an FTCA tort suit.[8] At a time when the military is revising other longstanding assumptions about military discipline – such as the presumed incompatibility of equal rights for gay servicemembers with military discipline – this Court should reconsider the assumptions undergirding *Feres*.

Finally, important changes to the surrounding law have rendered *Feres* anachronistic. We identified the first and most crucial set of changes in Part II: the sea change in this Court's approach to private remedies that has returned attention to statutory text and reined in freewheeling judicial implication of both private remedies and defenses. Equally important, the range of claims to which *Feres* potentially

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[8] *See, e.g., Day*, 167 F.3d at 682 (observing that *Feres* was decided "[i]n an age of modest tort judgments")

applies has broadened considerably since 1950. For example, civil rights claims and whistleblower suits have a potentially critical role in maintaining the rule of law within military society that the *Feres* court could hardly have anticipated.

Given all these changes, as well as *Feres*'s rank unpredictability and the lack of meaningful military reliance on its rule, it is high time to revisit *Feres*'s judge-made rule of immunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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